Appeal No. 03-56498

IN THE

United States Court of Appeals

FOR THE

Ninth Circuit

SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, *et al.*,
Plaintiffs-Appellants,

v.

KEVIN SHELLEY, *Defendant-Appellee*
– and –
TED COSTA, *Intervenor-Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, CASE NO. CV 03-5715 SVW
HON. STEPHEN V. WILSON, DISTRICT JUDGE

BRIEF OF APPELLEE TED COSTA IN SUPPORT OF *EN BANC* REVIEW

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***EN BANC* REVIEW IS NECESSARY AND DESERVED**

Two days ago, a three-judge panel of this Court threw the State of California into turmoil by reversing a district court and directing it to enjoin the October 7 gubernatorial recall election, even though more than 350,000 ballots have now been cast. It concluded that use of punch-card voting systems by some California counties but not others violates the Equal Protection Clause. To reach that result, the Panel based its decision on a clearly erroneous reading of the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), to stand for a proposition that all nine justices rejected. In deciding to postpone the election, the Panel discounted the State's interest in holding elections according to its constitutionally mandated schedule and ignored the undisputed evidence that the delay will likely produce greater voting disparity. The Panel's decision has already produced significant confusion among voters, election officials, and candidates alike.

Where, as here, a case involves numerous issues of "exceptional importance," *en banc* review is appropriate. Fed. R. App. P. 32(a)(2). This is such a case. If this Court can conduct a prompt *en banc* rehearing, then for the following reasons, it should do so, vacate the Panel's September 16, 2003 decision, and affirm the district court's order denying plaintiffs' motion to enjoin the October 7, 2003 election:

1. The Panel's decision distorts the Supreme Court's holding in *Bush v. Gore* to reach a result rejected by every Supreme Court justice in that case. *Bush v. Gore* did not address whether Florida's use of punch-card voting systems violated the Equal Protection Clause, but only the constitutionality of the Florida Supreme Court's recount procedures for punch-card ballots, which effectively shifted responsibility for calling the

winner from the voters to unguided canvassing boards and volunteers. The analysis was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." 531 U.S. at 109.

The Panel's decision ignores that admonition and applies *Bush v. Gore* to enjoin an election on the grounds that some California counties use punch-card ballots while others do not because punch-card systems allegedly produce a higher "error rate." In *Bush v. Gore*, however, all nine Justices of the Supreme Court found no constitutional problem with the use of punch-cards in some but not all Florida counties. As the per curiam opinion noted, "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109 (upholding initial count made by Secretary of State). In his concurrence, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, doubted the applicability of the Equal Protection Clause when he questioned whether a state could be forced to count a punch-card ballot that a voter failed to "clearly and cleanly" punch, or why failing to count such votes should be considered "an error in the vote tabulation" or a "rejection of legal votes." *Id.* at 118-20.

Justice Stevens' dissent, in which Justices Ginsberg and Breyer joined, unequivocally dismissed the Equal Protection Claim raised here:

> "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501, 51 S. Ct. 228, 75 L.Ed. 482 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ–despite enormous differences in accuracy–might run afoul of equal protection. So, too, might the similar decisions of the vast majority of

> state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

509 U.S. at 126.

Similarly, Justice Souter's dissent, in which Justices Breyer, Stevens, and Ginsburg joined, noted:

> It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.

Id. at 134:

Finally, Justice Ginsburg's dissent, in which Justices Stevens, Souter, and Breyer joined, also concluded that there cannot be a "substantial equal protection" claim based on ordinary disparities in vote counting:

> Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. *See, e.g., McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809, 89 S. Ct. 1404, 22 L.Ed.2d 739 (1969) (even in the context of the right to vote, the State is permitted to reform "one step at a time") (*citing Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 489, 75 S. Ct. 461, 99 L.Ed. 563 (1955)).

Id. at 144.

Remarkably, the Panel simply ignored the Supreme Court's Equal Protection analysis in its entirety, and based its decision on a string of more generalized "one man, one vote" platitudes it found scattered throughout the cases.

2. The Panel's decision confuses the constitutional "ideal" of "one person, one vote" with what the Constitution requires before a State can hold an election. No one disputes that the Constitution speaks in terms of one person, one vote, which Justice O'Conner has described as the "guiding ideal." *Brown v. Thomson*, 462 U.S. 835, 848 (1983) (concurring). But no one has ever said a state cannot hold an election unless it guarantees that mathematical equality will be achieved in weighing those votes. To the contrary, the Equal Protection Clause requires only that election officials make an "honest and good faith effort" to achieve "substantial equality," so that "as nearly as is practicable one man's vote … is to be worth as much as another's." *Reynolds v. Sims*, 377 U.S. 533, 558-59, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) (emphasis added) ("[S]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible ….") (emphasis added). *See Brown*, 462 U.S. at 848 ("ensuring equal representation is not simply a matter of numbers") (O'Connor, J., concurring).

In fact, the Panel's opinion pays no more than lip service to the idea that "the Constitution does not demand the use of the best available technology," before an election can be held, Opinion at 20, given that it demands on the next page that California refrain from conducting elections until each county converts to the best available technology. *Id.* at 21.

3. The Panel's decision conflicts with decisions finding greater deviations from mathematical voting equality to be constitutionally insignificant. The Panel's decision is based on a 1.3 percentage point differential in "residual rates" between punch-card voting and other

systems used in California. That percentage point differential, however, is not of constitutional consequence. Countless reapportionment cases stand for this proposition, notwithstanding that variations in population across districts dilute votes in more populous counties in the same way as chances of voting error diminish the weight accorded a voter using more error-prone technology. Indeed, in *Brown v. Thomson*, 462 U.S. 835, 842 (1983), the Supreme Court held that differentials of up to 10 percentage points in state elections were not only presumptively constitutional, they were constitutionally *de minimis*.

Even more compelling is *Bush v. Gore.* There, the Supreme Court told the Florida courts to stop a recount and to certify statewide election results that reflected residual rates as high as 3.9% for punch-card counties and as low as 1.4% for optical scan counties—a range of 2.5%. *See* 531 U.S. at 126 & n. 4 (Stevens, J., dissenting). This is double the residual rate variation the Panel found unconstitutional in this case. The *Bush v. Gore* majority, however, ordered the election results certified (not possible had they been deemed an equal protection violation), while the minority expressly approved of the use of a variety of voting systems, acknowledging that it would produce such wide swings in supposed reliability.

Moreover, the Panel's decision does not even bother to identify a threshold for voting disparity, above which the Constitution permits a court to second-guess state law or the decisions of state election officials, such as when to hold an election, or when an election is "important enough" to warrant waiting several months to conduct. By declaring the violation without articulating any meaningful standard to ascertain its existence, the Panel's decision invites standardless judicial intervention in every election

for which the mathematical equality of each vote cannot be guaranteed, that is, in every election. Indeed, given the documented residual rate differential between paper ballots and touch-screens—a full percentage point for the 1988-2000 presidential elections—California's March 2004 election cannot be held either. *See* 1 SER 50-51.[1]

4. There is nothing in the record to support the Panel's assertion that punch-card voting systems are more "error prone." The Panel erred by reaching to make a finding—essential to its decision and which the district court expressly declined to make—that "pre-scored punch-card systems are significantly more prone to errors." Opinion at 21. The finding is not supported by the record.[2]

The panel erroneously treated the Secretary of State's 2001 decertification of punch-cards machines as "almost dispositive" on this issue because it viewed the Election Code as authorizing decertification of machines considered only "defective" or "unacceptable." *Id*. at 21-22. But acting under a statute that allowed him to decertify systems that are "defective, obsolete, or otherwise unacceptable," Cal. Elect. Code § 19222 (emphasis added), he invoked only the second ground, obsolescence. He carefully avoided anything that would imply their inaccuracy, instead

[1] Citations to plaintiffs' one-volume Excerpts of Record are in the form: "ER [page]." Citations to Appellee Costa's two-volume Supplemental Excerpts of Record are in the form: " [vol.] SER [page]."

[2] Defendant Shelley's refusal to defend punch-card voting, Op. at 21-22, is not binding on Mr. Costa. Mr. Costa was granted leave to intervene, and as a party, his co-defendant's concessions on issues he disputed cannot as a matter of law dispose of the issues as to him. *United States v. Hay*, 122 F.3d 1233, 1236-37 (9th Cir. 1997).

analogizing them to typewriters, which "worked well for many years but are now obsolete in the world of the personal computer." 2 SER 389.

The Panel then took note of "the statistically significant disparities that exist between the systems," as presented in plaintiffs' expert affidavits, which Mr. Costa's experts conceded. Opinion at 21.[3] However, the proffered disparities were not of "error" rates, but of "residual" rates. "Residual" ballots are those not counted because the voter either selected no candidate in the race at the top of the ticket (an under-vote) or more than one candidate when a vote for only one is permitted (an over-vote). They are not a pure measure of error, as even plaintiffs' experts agreed. 1 SER 7, 46, 84-85. An appreciable portion of the residual vote results from deliberate abstentions or over-votes. *Id.* 7, 48. In Nevada, for example, the only state where an abstaining voter must check a "none-of-the-above" box, roughly 2% of voters in the 2000 election chose not to cast a vote for president—roughly the same as the California punch-card residual rate (2.23%) in that same election. 1 SER 35-36, 164.

That the residual vote includes deliberate under- and over-voting renders meaningless any comparisons between punch-card systems and

[3] The Court also considered a discussion contained in unsworn reports attached to Mr. Saltman's declaration addressing mechanical limitations and human-interface failings of punch-card systems, such as the failure of voters to fully remove chads from their ballots, inadvertent removal of chads during the counting process and the absence of a failsafe to keep voters from over-voting. However, his testimony failed to address the relative merit or accuracy of punch-cards compared to other systems, so it does not support a finding that the former are more error-prone. Nor did he mention or even consider California's decades-old procedures for preparing, maintaining, counting, and recounting punchcard ballots, so his generalized statements about punch-cards had little application here.

newer technologies. As Professor Michael Herron testified below, that is because, unlike punch-cards, the newer systems strongly discourage, or outright prevent, voters from under- and over-voting. 1 SER 31-32. Touch-screens systems generate error messages, and precinct-count optical scan alert poll-workers (who return the paper ballot to the voter to "fix"), whenever the system detects an under-vote or over-vote. *Id*. 8-9. Hence, one would expect punch-card to rate higher on the residual scale and that has nothing to do with any greater "error" in accurately recording votes.[4] In reply, plaintiffs' expert provided no meaningful explanation for confusing residual rates and error rates, and the Panel offers none.

Moreover, the reasonableness of using a particular voting machine in a given locality implicates many more issues than just error rate, and the Panel grossly oversimplified matters by ignoring the complex trade-offs involved. Touch-screens and optical scanning systems, for example, have drawbacks all their own, leading one Registrar to conclude that there is "no one size fits all." 1 SER 10. Touch-screens appeal because of their apparent ease of use, but the prestigious Caltech/MIT study ranked them poorly on accuracy; they produce no voter-verified paper audit trail to permit a post-election recount; and they are more readily compromised and prone to failure. 1 SER 9-10. Indeed, when touch-screens were rolled out in Florida in 2002, tens of thousands of votes were lost during the several hours it took to get them up and running. *Id*. at 247

[4] This is confirmed by comparisons of punch-card systems with central-count optical scan systems, which unlike precinct-count systems, do not warn voters away from under- and over-voting. According to the one peer-reviewed study cited by Dr. Brady, the residual rate for central-count systems was 50% higher than for punch-cards. ER 168; 1 SER 32-33.

Optical scan systems also are not perfect. Only precinct-count systems appear to generate significantly fewer residual ballots than punch-cards; as noted earlier, central-count systems, in the only significant peer-reviewed study, generated more residual ballots than punch-cards. ER 168; 1 SER 33. Moreover, discerning voter intent remains a problem. Stray marks can be mistaken for votes, and off-center markings intended as votes can be ignored, depending on how the card-reader is set up. 1 SER 9, 18-19. Punch-cards are more objective: as one Registrar said, "either there is a hole or there's not." *Id.* 18-19. In fact, the National Commission on Election Reform pointed to Los Angeles as an example of a large, ethnically diverse county "where punch cards make much more sense than optical scanners." 2 SER 303.

5. The Panel's decision brushed off the importance of holding elections on time and pursuant to the rules established before an election contest begins. The Panel's decision placed little weight on the State's interest in holding elections in accordance with its established procedures, free from mid-election changes. *See* Opinion at 32. Indeed, the Panel went so far as to say that a State does not even have a rational basis to follow its own constitutionally prescribed election schedules. *Id*. But contrary to the Panel's decision, there is a significant State interest in adhering to the timetable established in California's Constitution. Prescient wisdom led the drafters of the recall provision to require a quick vote, so that any cloud over an elected official would be resolved promptly. Moreover, there is the strong potential for manipulating the outcome of an election by playing with its timing. The State has a strong interest in adhering to its constitutional timetable so as to prevent that possibility from occurring, or even exposing its elections to such a charge. The Panel's decision has

already drawn strong criticism for re-writing California's election statutes in the middle of a vigorously contested race.

While some may laud the Panel for its zeal in defending voting equality in the name of federal supremacy, that unprecedented zeal directly contradicts the Supreme Court's direction that federal courts facing such circumstances should instead exercise "proper judicial restraint." *Reynolds*, 377 U.S. at 585-86 (courts must "consider the proximity of a forthcoming election" and exercise "proper judicial restraint"). *See also Ely v. Klahr*, 403 U.S. 108, 113 (1971) (permitting election to proceed under unconstitutional plan to avoid elections that were "close at hand"); *Kilgarin v. Hill*, 386 U.S. 120, 121 (1967) (affirming district court's decision to permit "constitutionally infirm" election to proceed); *Corder v. Kirksey*, 639 F.2d 1191, 1196 (5th Cir. 1981), *cert. denied*, 460 U.S. 1013 (1983) (affirming district court's decision to permit constitutionally questionable election to proceed given "impending" date).

6. The Panel's decision dismissed the right of Californians to decide the recall question now. Exercising a century-old constitutional prerogative of the people, almost 1.7 million Californians have called for a referendum on the governor's leadership and, perhaps, the selection of a successor. The right of citizens to control who governs them, pursuant to procedures they have established for that purpose, is critical. This right is not unique to Californians; eighteen states afford a right of recall "founded upon the most fundamental principle of our constitutional system"—that "the people may reserve the power to change their representatives at will," *Citizens Comm. to Recall Rizzo v. Board of Elections*, 367 A.2d 232, 274-75 (Pa. 1976), and may claim the power to remove those "whom the electors do not want to remain in office." *Groditsky v. Pickney*, 661 P.2d

279, 283 (Colo. 1983). The Panel's decision effectively entrenches for at least an additional five months a governor whose recall was petitioned by nearly 2 million eligible voters. It would subject the citizens of California to an additional five months of rudderless leadership, precisely at a time when the need for leadership is most urgent. The problems facing California are grave, ranging from near insolvency of its treasury, to the flight of jobs and businesses, to a hopelessly broken workers' compensation system, to a stalemated legislature. Those problems cannot be tabled for month after month while the Governor campaigns full time to keep his job. Yet the Panel's decision would, in effect, result in a judicially-installed interim chief executive officer and would cause "the electorate [to] have no say whatever as to the person to serve during that period." *Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988). Moreover, the decision does not require that the election go forward in March; different technologies with different residual rates will still be used in different counties then, and there is no guarantee that the Panel will not apply its ruling to postpone the recall further.

This is not simply a scheduling matter. Waiting disenfranchises <u>all</u> voters for the next seven months, stripping them of their recall right and potentially protecting the present governor from the people's will. The State has a compelling interest in avoiding this outcome, and, as the district court explained, a March 2004 election is not an adequate substitute:

> Because an election reflects a unique moment in time, the Court is skeptical that an election held months after its scheduled date can in any sense be said to be the same election. In ordering the contemplated remedy, the Court would prevent all registered voters from participating in an election scheduled in accordance with the California Constitution.… Furthermore, the recall election in particular is

> an extraordinary—and in this case, unprecedented—exercise of public sentiment. Implicit in a recall election, and explicit in the time frame provided by the California Constitution, is a strong public interest in promptly determining whether a particular elected official should remain in office.

ER at 27. *Accord Anderson v. Celebrezze*, 460 U.S. 780, 790, 103 Sup. Ct. 1564, 75 L.Ed.2d 547 (1983) (timing of an election matters because "the candidates and the issues simply do not remain static over time").

7. The Panel incorrectly balanced the hardships when it sacrificed the rights of millions of California voters to cast their ballots on October 7 because of the possibility that at most 40,000 votes may not be counted. No party is suggesting that those 40,000 votes don't matter. But at the same time the law recognizes that as long as mechanical voting systems are imperfect, some votes run the risk of not being counted. (Many of these 40,000 votes are likely to be counted through a manual recount if the election is close. Unlike Florida in 2000, California has extensive regulations for uniform recounts. The Panel did not address this fact.) Federal courts confronting this unavoidable reality recognize that in balancing the hardships, it is always worse to disenfranchise all of the voters by calling off or postponing the election. In the worst case scenario, if these few votes prove outcome determinative, a post-election remedy will always be preferable to an injunction against holding the election in the first place. *See Whitcomb v. Chavis*, 396 U.S. 1055 (1970) (refusing to delay election under a scheme found to be unconstitutional).

8. The Panel failed to consider whether the public interest is served by the injunction, given the undisputed evidence that an election postponed to March will likely suffer from ***greater*** error. Because disrupting the October 7 election unquestionably affects tens of millions of

Californians, it was reversible error for the Panel to grant plaintiffs' injunction without first concluding that the public would be best served by keeping Californians from voting on the recall for the next five months. *See Sammartano v First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) (where the public interest is involved, a court may not grant an injunction without expressly considering it); *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1114 (9th Cir. 1999). (failure to separately consider the public interest constitutes reversible abuse of discretion). To the extent the Panel conducted such an analysis, its conclusion that the public interest was served by enjoining the election was unjustified.

The Panel enjoined the October 7 election on the belief that the voting systems that will replace punch-cards by March 2004 in California counties that still use them will more accurately record voter intent. The record evidence, however, established just the opposite. The Panel simply glossed over uncontradicted evidence that other voting technologies in use in California, particularly electronic voting systems, produce significantly higher uncounted votes than competing systems. According to the Caltech-MIT study, for all presidential elections held from 1988 to 2000, touch-screens recorded under-votes and over-voters in 2.9% of ballots cast, compared to county averages of 2.9% for Datavote punch-cards and 3.0% for Votomatic punch-cards. As a percent of all ballots cast, electronic voting produced more residual votes than Votomatics in every year studied except 2000, leading the Caltech-MIT researchers to conclude that "[e]lectronic machines lost nearly as much as punch cards, averaging 2.3 percent over the past four elections."

While all counties will abandon punch-cards by March 2004, many will be able to deploy only interim solutions for that election. Los Angeles County, for example, intends to introduce an optical scan system ("InkaVote") using retooled punch-card machines that deposit ink marks on a card instead of punches. 1 SER 12. That system has many attributes common to the soon-to-be-decertified Votomatic that plaintiffs' experts say contribute to its unreliability (*e.g.*, potential misalignment of the ballot card, voter's inability to check his or her work, etc.). 1 SER 13-14. Los Angeles' new system has never been tested, other than for its mechanical integrity, and no performance data (including residual rates) exists because it has never been deployed in a real election anywhere. 1 SER 13. Moreover, the optical card reader that Los Angeles intends to use, as well as those to be introduced in Sacramento when it, too, switches over from punch-cards next March, are rudimentary versions that lack the feature—precinct-level scanning—that supposedly makes optical scanning more accurate. 1 SER 12-13. Plaintiffs' experts say that optical scanning systems contribute to an accurate tally because when ballots are scanned at the precinct level in the presence of the voter, under- and over-votes are caught, allowing the voter a "second chance" to fix his or her "mistake." ER 168. But neither Los Angeles nor Sacramento will have precinct level scanning next March; ballots will be read at a central location long after the voter has left the polling place. And as noted earlier, central-scanned paper ballot systems have been documented to create 50% more residual votes than even punch-cards. 1 SER 14.

As a result, the Panel's decision will actually force millions of California voters to decide the recall and Propositions 53 and 54 questions next March using voting systems that most likely are substantially less

reliable than the ones that will be used in other counties and that are currently available. *See* 1 SER 11-15; Henry Weinstein, *Appeals Court Orders Delay of Recall*, L.A. TIMES, Sep. 16, 2003, at A1 ("'It's more than a wrinkle,' said Los Angeles County Registrar-Recorder Conny McCormack. 'No one even asked the largest county in the state if we had the capacity to run it in March. The answer is no.'").[5] Far from protecting voting rights, the Panel's decision actually undermines them. Further, the Panel's decision invites only further litigation over the constitutionality of conducting the election in March 2004.

9. Left undisturbed, the Panel's decision calls into question every election in every jurisdiction that uses punch-card voting systems, or different voting systems in different counties. On its face, the Panel's opinion holds that punch-card voting systems are unconstitutional and may not be used to conduct elections. Even if no court outside this Circuit finds the Panel's opinion persuasive, punch-card systems are used throughout the Circuit.

And the Panel's decision extends beyond punch-card systems, given that it is based on the theory that the Equal Protection Clause precludes a state from using different voting systems in different parts of a state if those systems do not have equal rates of accuracy. This is no small matter.

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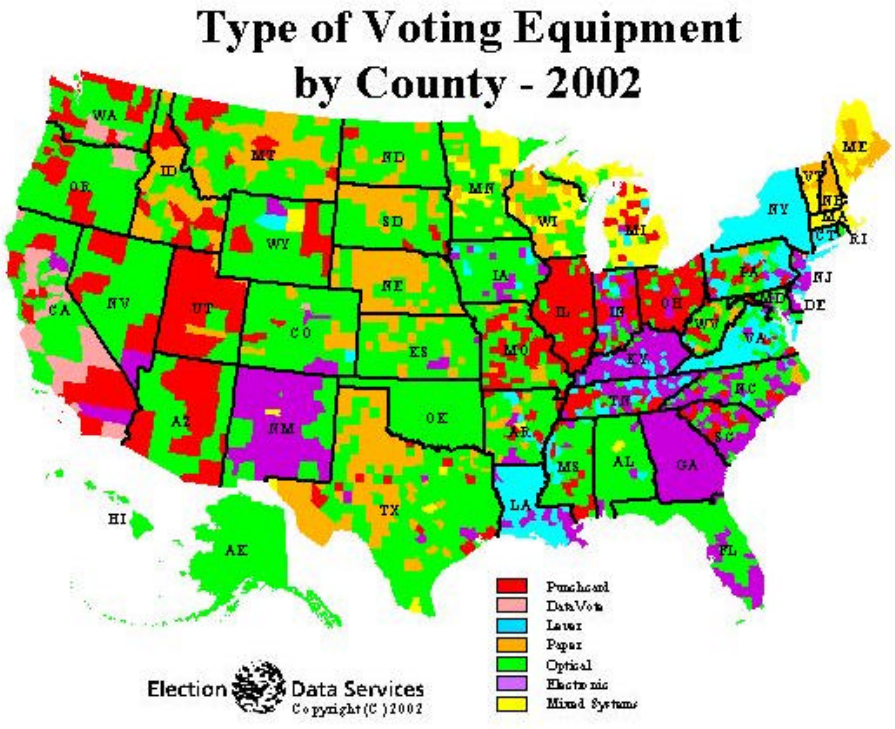
[5] *See also* Howard Bashman, *Meet hanging chad's relatives, scribbled oval and hacked touchscreen*, <http://appellateblog.com/2003_09_01_ appellateblog_archive.html#106365589040317778> (Sep. 15, 2003), Eugene Volokh, *California Recall and Technology* <http://volokh.com/ 2003_09_14_ volokh_archive.html#106365996330480386> (Sep. 15, 2003); Jim Drinkard, *"Punch cards are as good as any system"*, USA TODAY, Sep. 16, 2003, at A2; Cliff Swett, *Voting devices' security at issue*, SACRAMENTO BEE, Sep. 7, 2003 at D1.

From a voting machine standpoint, American is a hodge-podge of systems reflecting the understandable independence of local election officials to adopt solutions that make local sense. If the Panel is right, dark constitutional clouds loom over every state deploying more than one system. And that means most of them. As indicated in the checkerboard map below, only eight states have adopted a single, state-wide voting technology. Unless the others flee to a lowest common denominator voting solution, despite the disservice to the voting public such a change would represent, forty-two are in for the constitutional fight of their lives, lest this Court *en banc* take quick action.



For the foregoing reasons, this Court should rehear plaintiffs' appeal *en banc*, vacate the Panel's September 15, 2003 decision, and affirm the district court's order denying plaintiffs' motion to enjoin the October 7, 2003 election.

Dated: September 17, 2003.

Respectfully submitted,

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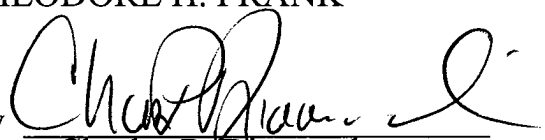
By 
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CERTIFICATE OF CIRCUIT RULE 32-1 COMPLIANCE

Pursuant to Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, uses a 14-point Times Roman typeface, and contains 4,536 words (including footnotes but not including the table of contents, and table of citations).

Dated: September 17, 2003.

Respectfully submitted,

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PROOF OF SERVICE BY E-MAIL TRANSMISSION

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 1999 Avenue of the Stars, Seventh Floor, Los Angeles, California 90067-6035. On September 17, 2003, I served the following:

BRIEF OF APPELLEE TED COSTA
IN SUPPORT OF *EN BANC* REVIEW

by e-mailing a true and correct copy thereof together with an unsigned copy of this declaration to the following persons, at the following e-mail addresses:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 17, 2003, at Los Angeles, California.

Robert M. Schwartz

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I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 1999 Avenue of the Stars, Seventh Floor, Los Angeles, California 90067-6035. On September 17, 2003, I served the following:

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IN SUPPORT OF *EN BANC* REVIEW

by putting a true and correct copy thereof together with an unsigned copy of this declaration, in a sealed envelope, with delivery fees paid or provided for, for delivery the next business day to:

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1300 I Street
Sacramento, California 95814

and by placing the envelope for collection today by the overnight courier in accordance with the firm's ordinary business practices. I am readily familiar with this firm's practice for collection and processing of overnight courier correspondence. In the ordinary course of business, such correspondence collected from me would be processed on the same day, with fees thereon fully prepaid, and deposited that day in a box or other facility regularly maintained by Federal Express, which is an overnight carrier.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 17, 2003, at Los Angeles, California.

Angela C. Dooty

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